IN THE

Supreme Court of the United States

No. 78-955

GUIDO CONDOSTA,

Appellant,

v.

ROSALIE CONDOSTA,

Appellee.

ON APPEAL FROM THE VERMONT SUPREME COURT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Guido Condosta, appeals from a judgement of the Supreme Court of the State of Vermont entered on Sept. 11, 1978, which affirimed the final order of the Superior Court of Vermont, granting a divorce to Rosalie Condosta, Appellee, and thereby depriving the appellant of his home. The Appellant also appeals the judgement of the Supreme Court of the State of Vermont entered on Oct. 2, 1978, which denied the Appellant's motion to re-argue. The Appellant submits this statement to show that the Supreme Court of the U.S. has jurisidiction of this appeal and that the question presented is substantial. The Notice of Appeal is set forth in Appendix A.

OPINION BELOW

The opinion of the Supreme Court of the State of Vermont, and the final denial of the Appellant motion to re-argue, which have not yet been reported, are set forth in Appendix B and C hereto, respectively. This is an Appeal from these orders.

JURISDICTION

This action was instituted by Rosalie Condosta on Apr. 11, 1975 pursuant to Vermont Statutes Annotated, Title 15, Section 551,

Subsections 3 and 7 in Vermont Superior Court. The purpose of the suit was to grant Rosalie Condosta divorce from the bonds of matrimony to Guido Condosta and for the purpose of obtaining free and clear title to the conjugal home of the parties. The judgement of the Superior Court was entered on Feb. 7, 1977. The Appellant, Guido Condosta, filed a notice of appeal to the Vermont Supreme Court on Feb. 14, 1977, for judicial review. The Vermont Supreme Court issued an order affirming the lower court's judgement on Sept. 11, 1978. The Appellant filed a motion to re-argue on Sept. 22, 1978. The motion to re-argue was denied on Sept. 25, 1978. Notice of appeal was filed in that court on Oct. 5, 1978 to the U.S. Supreme Court. The jurisdiction of this court is invoked pursuant to Title 1257 (2) of 28 U.S.C. The following cases support jurisdiction:

BELL V. BERSON, 402 U.S. 535, 29 L. Ed, 290, 91 S. Ct., 1586.
FUENTES V. SHEVIN, 407 U.S. 67, 32 L. Ed 2, 556, 92 S. Ct. 1983
SIBACH V. WILSON & CO., 312 U.S. 1-19, 161 S.Ct. 422.
SLOCHOUR V. BOARD OF HIGHER EDUCATION, N.Y.C., 350 U.S. 551, 76 S. Ct. 637.

STATUTES INVOLVED

The case involves the due process clause of the 14th Amendment to the U.S. Constitution, Vermont Statutes Annotated, Title15, Section 551, Subsections 3 and 7 and Vermont Rules of Civil Proceedure, Rules 12, 15, 56, 62 and 80. The text of these statutory provisions are set forth in pertinent part in Appendix D.

QUESTION PRESENTED

Whether the due process clause of the 14th Amendment to the U.S. Constitution allows State Courts to Temporaily deprive a person of property, permanently deprive a person of property, deprive a person of liberty by incarceration and create a divorce claim for a plaintiff, that was not supported by the claims which instituted the action, by setting aside the duly enacted legislative divorce due process proceedure, on the ground that " " Vermont Rules of Civil Proceedure 80 (b) might seem to support this contention requiring as it does that a divorce complaint " state particularly the factual basis of the claim ", But long practice,

under a state statute with similar wording has been the opposite, based upon the peculiar nature of divorce " ",(Opinion of State Supreme Court Appended)?

STATEMENT OF THE CASE

(a) PREFACE

The Appellant in this statement catagorizes different aspects of the case for the purpose of clarity. The Appellant believes that each alleged violation of his rights is sufficient for this court's review to determine that the Appellant was deprived of property by the State of Vermont, in a manner repugnant to the due process clause of the 14th Amendment to the United States Constitution.

On Apr. 11, 1975, while the Appellant was living at home with his wife and two adult children, the Appellant was served with divorce papers. The divorce complaint asserted that Appellant's wife was entitled to a divorce on the grounds of " "six months separation ". (Anticipatory(, " " and " intolerable severity ". On Apr. 25, 1975 the Appellant was notified of a hearing on Appellee's motion to give Appellee sole possession of the family home.

On Apr. 28, 1975, a hearing was held in Vermont Superior Court on Appellee's motion. Appellee was represented by counsel and the Appellant appeared pro-se. No record was made of this hearing. The Appellee gave no testimony to support her claim of "Intolerable Severity" and could not support her claim of separation because the parties were living together. There was no showing that the Appellee was likely to prevail on the merits.

The Appellant attempted to oppose the motion, but before he could make all his arguments, the court stopped his participation in the hearing. The Appellant was told by the court to sit down and shut up or he would be held in contempt of court. The court then adjourned the hearing and said it would make a decision.

Although alimony had been stricken from the printed complaint and no notice had been given to the Appellant relating to alimony, the court ordered the Appellant to pay $25.00 per week alimony and ordered the Appellant out of his home, by order of Apr. 29, 1975. (Superior Court Docket Entry).

After this, the Appellant Should have expected the worst. The Appellant who had no money continued to represent himself. The Appellant's efforts to litigate according to the Vermont Rules were defeated by the Superior Court, which ignored the Rules. By failing to follow the Legislatively enacted Rules, the Vermont Courts denied the Appellant the proceedural rights he had the right to. Placing thier weight on the side of the Appellee, to create a claim of separation, which was ultimately used to support the final order, after the Appellee failed to prove that the claims which instituted the action had the merit to support the final order, or the court ordered temporary separation.

(b) STATEMENT OF THE CASE, RELATING TO INSTITUTION OF THE ACTION, DENIAL OF DUE PROCESS AND DEPRIVATION OF PROPERTY.

The parties, Guido Condosta, Appellant, and Rosalie Condosta, Appellee, Were married in Oct., 1937.

In Apr. of 1975, Rosalie Condosta, filed and served divorce complaint against Guido Condosta, in Vermont Superior Court.

Following a verbal argument in Dec. 14, 1975, between the parties, the Appellant left home to allow the Appellee to cool aff. The Appellant returned on a number of occasions in the next two monthsto make peace. (Finding of the Court in the final order). The Appellee had decided to "Get Rid" of the Appellant, (Transcript of trial). The Appellant thereby returned in March of 1975 and told the Appellee he had no intentions of leaving his home and intended to live there. There is no record of verbal or physical violence between the parties during the aforementioned period. There was no substantive verbal or physical violence or persistent misconduct of the Appellee during the 38 years of the marriage. The trial record shows, even if assumed to be true, three minor physical abuses; a kick, a push out of bed and a push, about 10 or 15 years prior to institution of the action.

The complaint alleged that the Appellant had treated the Appellee with " Intolerable Severity " as a ground for divorce. This allegation was designed to comport with Vermont Statutes

Annotated, Title 15, Section 551, Subsection (B), which authorizes the State to grant a divorce for " Intolerable Severity ".

The complaint also alleged that the parties have lived separate and apart for six consecutive months, the resumption of marital relations not being reasonably probable. (Anticipatory), designed to comport with Vermont Statutes Annotated, Title 15, Section 551, Subsection (7). There is no " Anticipatory " provision in the above statute, as separation grounds. (Statute Appended).

The Appellee also requested clear and free title to the home of the parties and one half of the household furnishings..

The Vermont Legislature has enacted certain Rules of Proceedure known as the Vermont Rules of Civil Proceedure. Included in these Rules is one designated as "SPECIAL RULE FOR DIVORCE, 80 ". The first paragraph of this Rule Says, " (a) Applicability of Rules to Divorce. The Rules of Civil Proceedure shall apply to actions for divorce except as otherwise provided for in this rule. ". The second paragraph says in part, " (b) Complaint; Service. The complaint in an action for divorce shall state particularly the factual basis for the claim . . . . . ", (Rule Appended).

At this point it may be significant to note that not one fact is given in the complaint to support the claim of " Intolerable Severity ". By use of the word, " Anticipatory " the Appellee is saying that she wants a divorce although a sepatation as required by law does not exist.

Nevertheless, failure to comply with the Rule for a factual complaint need not be fatal. The State Legislature provides a remedy of amendment in Rule 15 of the Vermont Rules of Civil Proceedure, not excepted by Special Rule 80, (Rule Appended).

Also by these same Rules, not excepted by Rule 80, The State Legislature provides a remedy to a defendant if a plaintiff fails to comply with the Rules, in Rule 12 and 56, (Rules Appended).

The defective complaint, without correction, was used by the Vermont Superior Court to proceed in the entire action, grant a divorce on a factual six months separation, created by court order, to take away the appellant's home and home rights. The State Supreme Court affirmed the final judgement.

(b1) THE APPELLANT ALWAYS RELIED ON HIS RIGHT TO A FACTUAL COMPLAINT AND A MEANINGFUL NOTICE OF A FACTUAL COMPLAINT.

On May 15, 1975, on written motion, with the heading, " Lack of a claim for relief ", the Appellant requested dismissal of the action on the ground that the plaintiff had failed to make a factual complaint, (Superior Court Docket Entry).

At a hearing of May 28, 1975, the Appellant requested facts, " In order to prepare a defense ", (Transcript and filed motion at the hearing). At this same hearing, the Appellant requested dismissal on his motion because the allegations for divorce were not factual.

The Appellee rested on her complaint in exactly the same form as when it had instituted the action.

The remedy of dismissal is supported by Vermont Rules of Civil Proceedure, not excepted by Rule 80, 12 and 56, appended hereto.

Although the court granted a remedy of deposition for facts as requested, this order was superceeded on request of the Appellee and the Appellant was ultimately denied this remedy by the Vermont Superior Court.

The court denied the Appellant's motion to dismiss on Sept.3, 1975, (Superior Court Docket Entry). The record remained void of facts to show that the Appellee might prevail on the merits. The Appellant was denied his proceedural right to a factual complaint. The case proceeded to trial.

At the trial the Appellant again renewed his motions to dismiss for lack of a factual complaint as required by Rule 80 (b), (Transcript of the trial Pages 175, 181, 182, 183, 187). In these pages, it will be seen that the Appellant stated to the court that an Anticipatory claim of separation was unreasonable for a person to answer to; that it did not comport to the law; and requested to strike. The Appellant aslo argued that it was unfair to answer to facts heard for the first time at the trial, when his fundamental rights to facts, under Rule 80b, had been consistently denied by the Court for 1½ years.

The Court denied the Appellants motion to strike and dismiss. The Court proceeded with the trial by saying that the format

of the complaint was proper on its face. In the absence of any other claim, the Court thereby established that the trialble issues were an " Anticipatory " claim of separation and "Intolerable Severity "as the grounds for divorce.

The trial on the merits established that a six month factual separation did not exist on May15, 1975 when the Appellant requested dismissal of this " Anticipatory " claim which did not comport with the law, (Final findings of fact by the Vermont Superior Court, #1, 19, 21). " Intolerable Severity " was not established as the ground upon which the divorce was granted. The final order granted a divorce on the grounds of a factual six months separation, although this claim, whatever the reasons, was consistently and willfully witheld by the Appellee and the Court, to deny the Appellant the Legislatively enacted fundamental proceedural right to notice of a factual complaint.

Therefore, on May 15, 1975, neither of the claims which instituted the action, had the merit to support a divorce and the Appellant was entitled to dismissal as a matter of law according to Rule 56.

The Appellant appealed the final order to the Vermont Supreme Court.

(b2)

THE FEDERAL QUESTION WAS RAISED.

The record shows that the Appellant filed briefs, made oral argument and a motion to re-argue in support of his position as stated.

In argument E of the Appellants appeal brief, he argued that the " Anticipatory " claim should have been dismissed and concluded with these words, " Such separation was created in violation of Appellant's rights to due process and equal protection as guaranteed to him by the 14th Amendment to the U.S. Constitution ", (Page 20 of Appellant's appeal brief).

The Appellant again raised the Federal question in Appellant's reply brief. " The court made itself a party to the illegal withholding of a factual complaint by putting its weight on the side of the ones who were disregarding the law ". The final order deprived the Appellant of property, in violation of his fundamental due process proceedural rights to a factual complaint ", (Contained in Page 4 of the Appellant's appeal reply brief). Also included on the same page, " This is a violation of the 14th Amendment to the U.S. Constitution ".

In paragraph 5 of the opinion by the State Supreme Court, the Court says, "Long before final hearing it had become evident that this word (Anticipatory) was mere surplusage, and its deletion would have verged on the " useless act 'we do not require", (Anticipatory added).

In the motion to re-argue, the Appellant stated, " " Deletion of the word " anticipatory " on May 15, 1975, would have been a false statement in a verified complaint " ", (Page 7 of the motion to re-argue which was denied by the State Supreme Court).

Also in paragraph 5 of this same opinion, the Supreme Court says, "Under a former statute requiring a stated period of desertion, this court held in Hemenway that anticipatory pleading was not subject to dismissal, even though unamended ".

On Page 7, of the Appellant's reply appeal brief he stated, " The appellant exercised his right under Hemenway v. Hemenway, 65 Vt. 623, to return home in order to defeat the separation the court was unjustly enforcing on him, to place the burden of separation on the party who did not want a separation ".

In His motion to re-argue the Appellant says, (Page 8), " This court is in error to say that Hemmenway held that an anticipatory claim was not subject to dismissal. A reading of Hemmenway reveals that the court said if the deserting party returns even on the last day before the statutory period runs, the cause would be defeated ".

The Appellant further stated in his motion to re-argue, " This violation of the Appellant's proceedural due process right created the separation used to deprive the Appellant of property ".

The Appellant's motion to re-argue was denied by the Vermont Supreme Court.

C

STATEMENT OF THE CASE RELATING TO STATE JUDICIAL REVIEW AND DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

After institution of the action, as shown, the Appellee filed a petition with the Superior Court. In This petition the Appellee's Attorney said that since returning home, the Appellant had treated the Appellee with abuse and threats and requested the court to order the Appellant out of his home. This petition was void of facts, testimony or any signature of the Appellee. A request for alimony was struck from the printed complaint by the Appellee and no notice for alimony was in the petition. This petition was served on the Appellant on Apr. 25, 1975, Filed with the Superior Court on Apr. 28, 1975 and a hearing was held in Superior Court on this same date. The Appellee was represented by counsel and the Appellant appeared pro-se. No stenographic, electronic or mechanical record of this hearing was made.

The testimony of the Appellee, at this hearing, related only to alimony. After this testimony, the Appellant attempted to be heard. The court threatened the Appellant with contempt if he (Appellant) persisted to be heard. With this the court, adjourned the hearing and said a decision would be forthcoming.

The Appellant wrote a letter to the court, prior to a decision, requesting to know why the court had allowed the Appellee to testify but denied the Appellant the right to be heard, (This letter is contained in the record of the case, with a docket entry).

The Court, by order of Apr. 29, 1975, temporarily orded the Appellant out of his home, granted Appellee temporary alimony and Attorney fees.

The law relating to use of property, pending a divorce action, is contained in the Special Divorce Rule, 80 (c), (Appended). Applicable section reads, " . . . . . Such judge may make such mandatory or other orders in respect to the possesion, control or use of the real and personal property of the wife, of the minor children, of the husband or the husband and wife jointly, as may be just and equitable ", (Emphasis added).

TheAppellant did not believe it was <u>just or equitable</u> for a court

to deprive him of property in the absence of a single fact to show that the Appellee might prevail on the merits. The Appellant believed that the interpretation of Rule 80 (c) by the court to deprive him of property was repugnant to the due process clause of the U.S. Constitution. Therefore the Appellant filed a motion to rescind the Apr. 29, 1975 order. The motion was supported by notary certification.

In the motion, the Appellant testified that no facts has been given by the Appellee to support her claims for divorce or temporary requests,the Appellant was 100% disabled, had an income from Social Security of $155.00 per month and would not be able to comply with the order. The Court denied the motion on Sept. 3, 1975 and proceeded with the action.

Due to his poverty, the Appellant was unable to comply with the order. On petition of the Appellee, the court incarcerated the Appellant by disregarding the Appellants testimony that he was on Social Security disability, had a total income of $155.00 per month, had no bank accounts or any assets other than a 1965 car and a few personal possessions, the Appellant was incarcerated some days after filing a notice of appeal. The record remained void of facts to show that the Appellee might prevail on the merits and no testimony was offered by the Appellee to show that the Appellant could comply with the order of the court. After serving some 9 days in jail, the Appellant was released by order of the State Supreme Court, which later found that the Superior Court committed error.

It appears apparant, that a temporary order, arbitrarily issued by the State Court, deprived the Appellant of freedom and of property, in the absence of a single fact to show that the Appellee might prevail on the merits of her cause. The attempt by the Appellant for review of the Apr. 28, 1975 hearing, which produced the temporary order, and failure of the Appellee to comply with the law, was denied byf the State Supreme Court. The Appellant was forcibly removed from his home by State Police and under duress of contempt was kept out of his home to create a six months separation which did not exist when the suit was instituted.

The action proceeded to trial, where pre-trial issues, as previously shown, were established, " Intoleralbe Severity " and an "Anticipatory Separation".

Without a single fact to show that the Appellee might prevail on the merits of these claims, the court ordered the Appellant out of his home to create a statutory separation. At the trial, the Appellee failed to prove that either claim, which instituted the action and used to support the procedure, entitled her to a divorce. The court used the results of the temporary separation to grant a divorce and deprived the Appellant of his home and home rights.

(C1)

THE FEDERAL QUSETION WAS RAISED
RELATING TO THIS
STATEMENT OF THE CASE.

The trial transcript Page 82,"...and on Apr.28, when the decision was made, the defendant was denied due process". On Page 187,"I am being asked at this hearing, without notice, which is a due process requirement here, and this was done to me once, on Apr. 28."

On Page 13, of his appeal brief to Vermont Supreme Court, the Appellant says, "The Trial Court was in error in its finding #22 (PC 48) since it was based upon a hearing (April 28, 1975) (PC Docket entry1) (P.C. 12, 13, 14, 15) held in violation of Appellant's due process rights to notice and a right to be heard on the suits presented at said hearing, United States Constitution, 14th Amendment" (P.C. 16, 17, 18, 19, 20, 21, 22, 23) (P.C. 56, 57.).

Page 20 of the appeal brief says, "The Transcript and Printed Case clearly show six months continuous separation after Appellant was ordered out of his house by order of Apr. 29, 1975. Such separation was created in violation of Appellant's rights to due process and equal protection as guaranteed to him by the 14th Amendment to the United States Constitution".

On Page 27 of the appeal brief, the Appellant says, " "In the absence of facts or testimony to act, it appears the court was acting on conclusory statements of allegations, supported by its jurisdictional power to issue the order of Apr. 29, 1975. The appellant believes the court was in error to order the appellant out of his home, in violation of his due process sights, as herewith cited; Walker V Sauvinet, 92 U.S. 90, "What is due process of law is regu-lated by the law of the state". Slochower V Board of Higher Education of N.Y.C., 350 U.S. 551, 76 S. Ct. 637, "The protection of the individual from arbitrary power is the very essence of due process of law". .....For the reasons given above, the Appellant believes the final order (P.C.50) was issued in violation of the appellant's due process rights under the laws of the State of Vermont and the 14th amendment to the U.S. Constitution" ".

In the 6th paragraph of the order affirming the final order of the Superior Court, The Vermont Supreme Court says "(3) that by granting his wife temporary use and occupancy of the home, the court in effect created the cause of action for which it granted the divorce".

In paragraph 7 of this same order the Supreme Court says, "Defendant's argument that the court created the cause of action upon which it granted the divorce is an igenious one..... Further, the order awarding temporary use of the premises is interlocutory in nature, appealable only under V. R.A. P 5, to which defendant did not resort. As of now, superceded by the final judgement, its provisions are moot".

On Page 6, of his motion to re-argue, the Appellant says, "Let the court take judicial notice that the temporary order of Apr. 29, 1975 in which the Appellant was ordered out of his home is incorporated in the final order (Paragraph 5 & 7 of final order dated Feb. 7, 1977). It is error for the court to say that as an interlocutory order, it is superceeded by the final order, when the final order incorporates the temporary order".....".

The Vermont Supreme Court denied the motion to re-argue.

THE QUESTION IS SUBSTANTIAL

1 .... THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT TO THE U.S. CONSTITUTION DOES NOT ALLOW A STATE TO DEPRIVE PERSONS OF LIBERTY OR PROPERTY BY VIOLATING THEIR LEGISLATIVE ENACTED DUE PROCESS PROCEDURAL RIGHTS.

On the surface, this may appear as an appeal from a divorce action. There are underlying issues which relate to substantive deprivation of property and personal freedom of the Appellant by the State of Vermont, in a manner repugnant to the 14th amendment to the U.S. Constitution.

On Apr. 29, 1975, the Vermont Superior Court temporarily ordered the Appellant out of his home. The record up to this time was void of facts or testimony to show that the Appellee might prevail on the merits of her allegations.

In its opinion (Appended paragraph 6) the Vermont Supreme Court says, ""Defendant argues that this additional allegation (intolerable severity) was also defective, because it did not set forth the specific acts claimed to constitute intolerable severity. V. R. C. P. 80 (b) might seem to support this contention, requiring as it does that a divorce complaint "state particularly the factual basis for the claim." But long practice, under a statute with similar wording, has been the opposite, based upon the peculiar nature of the divorce action"".

The Vermont Supreme Court takes the position that because a divorce action is peculiar in nature, this gives a Court the right to defeat the legislative enacted law (Rule 80 (b), requiring fundamental notice of facts in a divorce complaint and legislative enacted law (Rule 80 (c) (3), which requires a Court to be guided by just and equitable cause in temporary deprivation of property, pending a divorce action.

The Apellant believes that the due process clause of the 14th amendment to the U.S. Constitution does not support this position, when substantive rights are involved.

On May 5, 1975, the Appellant offered testimony to the court, in a motion to rescind the Apr. 29, 1975 order, (Supra). This

motion was supported by notary certification. In the motion the Appellant introduced deprivation of the only home Appellant had, his physical and financial inability to comply with the court order and the absence of any facts on the record to show that the Appellee might prevail on the merits.

The issues raised by this motion went beyond the peculiar nature of a divorce action. The issues related to substantive property right to a persons home, financial inability to comparative living conditions, physical infirmity of the Appellant and overall inability for the Appellant to comply with the temporary Court order, and survive at the same time. For the substantive reasons set forth, the Appellant believes he had the right to the proceedural due process enacted by the Vermont legislature, before he was temporarily deprived of his home.

The Appellant believes this court supports the Appellant's position in Bell V Berson, 402 U.S. 535, 29 L. Ed 2d 290, 91 S. Ct. 1586, in which the Court says, relating to a drivers license, ""Rather, as the Court stated, it is an "important interest", id., at 539 L. Ed 2d at 94, entitled to the protection of proceedural due process of law"". Surely, home and home rights should be entitled to the same protection as a drivers license.

On May 25, 1975, at the hearing in Superior Court, on his motion to rescind, the Appellant again notified the court, supported by the record, that the allegations of the complaint were not factual. The Appellee did not oppose the motion in any form or manner. The record remained void of facts or testimony to support either the allegations of the complaint or the petition upon which the Appellant was ordered out of his home. On Sept. 3, 1975, the Court denied the Appellants motion to rescind, on a record still void of a single fact to show that the Appellee was likely to prevail on the merits.

No record was made of the temporary hearing of Apr. 28, 1975. At the trial (Trial transcript) the Appellee's attorney stipulated that no facts to support the claim of intolerable severity had been given anytime prior to trial. To this date the record is void of any facts or testimony to support the petition upon which the temporary order of Apr. 29, 1975 was issued. Yet this temporary order,

not supported to this date, created the separation used to support the final order.

Fuentes V Shevin, 407 U. S. 67, 32 L. ed 2d556, 92 S. Ct. 1983, relates to replevin of goods. The Appellant believes that opinions of this court relating to temporary orders in this case are applicable to the instant case and requests this court's consideration. At A (13, 14) 572, the Court says, " "But it is now well settled that a temporary, non final deprivation of property is nonetheless a "deprivation" in terms of the 14th Amendment" ". In (9, 10) 571 of Fuentes the Court says, "Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides - and does not generally take even tentative action until it has itself examined the support for the plaintiff's position.".

This case involved much more than a drivers license or a T.V. set. The court was consciously dealing with a 62 year old person, disabled, on a meager income, with no assets and with the only home he had from a lifetime of effort. Surely the Appellant had the right to protection of the procedure he relied on. The court denied him this protection with devestating results, without any support for the appellee's position.

The Appellant requested both the Superior Court and the Supreme Court, on motion, for permission to reconstruct the record of the hearing of Apr. 28, 1975, upon which the temporary order was founded and in which no record was made. Permission was denied by both Courts. Thus, a Court of Record contains an order which is not supported in the record of a hearing.

The Appellant believes that the gross violations of the due process proceedural rights and the denial of protection of the procedure, with consequential deprivation of home and liberty of the Appellant, are alone sufficient for plenary consideration of this Court.

II....THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT TO THE U.S. CONSTITUTION DOES NOT ALLOW A STATE TO DEPRIVE PERSONS OF PROPERTY, BY DENYING THEM THE PROTECTION OF THE DUE PROCESS PROCEDURE ENACTED BY THE STATE LEGISLATURE.

On May 15, 1975, after institution of the action, the Appellant requested the Superior Court, on motion, to dismiss the action for lack of a claim upon which relief could be granted. After a hearing on this motion, on May 28, 1975, the Court denied the motion, despite the Appellees disregard of the law which required a factual complaint to proceed with the action. At this time, the Appellant was relying on Rule 80 (b) which requires a factual complaint in a divorce action and Rules 12 and 56, (Appended), not excepted by Rule 80, (Appended). According to Rule 56, the Appellant was entitled to dismissal, as a matter of law. Not only were there no genuine issues on the record to support the material facts, the record was void of facts.

The procedure carried on by the Court in this instance appears contrary to procedure as defined by this Court in Sibach V Wilson & Co., 312 U.S. 1-19, 161 S. Ct. 422, "Procedure is the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them".

The Appellant's inability to comply with the temporary order was treated as contempt by the Superior Court. The Appellant's attempt, to relitigate the hearing which led to the contempt charge, was denied by the Court. The affidavite and other testimony reafirming the financial and physical inability of the Appellant to comply with the temporary order, were disregarded by the Court. In the absence of opposing testimony or facts by the Appellee, the court ordered the Appellant to be incarcerated in a State correctional institution for 30 days, for contempt. Prior to incarceration, the Appellant again relied on the Legislative procedure for protection. The Appellant filed a notice of appeal, pursuant to Vermont Rules of Civil Pro-

cedure, 62, which gave him the right to a statutory stay of the incarceration order, pending appeal. The protection of the due process procedure invoked by the Appellant was ignored by the superior Court in the grave matter of liberty and the Appellant was incarcerated.

After some nine days of incarceration, the Appellant was released on order of the Vermont Supreme Court. This Court later ruled that the Superior Court committed error in deprivation of the Appellants liberty.

The Court, without a single fact to judge whether the Appellee might prevail, denied the Appellant protection of the procedure.

Under duress of arbitrary power of contempt, the Appellant was kept out of his home, to create the statutory separation which did not exist and was not claimed to exist when the suit was instituted.

Rule 62 designed by the State Legislature, protects a person from arbitrary power and the use of power. The incarceration in disregard of the law was violation of the Appellants due process rights as stated by this Court in Slochour V Board of Higher Education, N.Y.C., 360 U. S. 551, 76, S. Ct. 637, "The protection of the individual from arbitrary power is the very essence of due process".

In the appeal, which overturned the contempt order of the Superior Court regarding to incarceration, the Supreme Court denied review of the Apr. 28, 1975 hearing upon which the contempt order and incarceration was founded.

Under duress of the Court's power and denial of the due process procedural protection, the Appellant was forced to create a statutory separation which was used by the Court to support the final order and to deprive the Appellant of his home and home rights. The final order was not supported by the merits of the claims upon which the temporary order was issued.

The Supreme Court of the State affirmed the final order of the Superior Court (Opinion appended). The Supreme Court denied review of the interlocutory order which created the separation on the ground that, as an interlocutory order the temporary order

was superceded by the final order and the issue was moot.

This opinion is not supported by the record. In the final order, the Superior Court referred to the temporary order of Apr. 29, 1975 in awarding fees to the Appellee's attorney. The State Supreme Court in review, upheld the award of Attorney fees granted by the order of Apr. 29, 1975, included in the Superior Courts final order.

The Court proceeded with the action, on a record void of a single fact which the Court could examine to show that the Appellee might prevail on the merits. In Fuentes V. Shevin, (Supra) this Court says, "It has long been recognized that fairness can rarely be obtained by secret, one sided determination of facts. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to be heard." In the absence of facts, the only meaningful defense was to request the facts as provided by the State Legislature. In denial of this defense, the court did not enforce the Appelle's duty to state particularly the factual basis for the claim, nor did the Court provide any remedy to the appellant for the Appellee's disregard of the law, by willfully witholding facts the Appellant had fundamental legal right to.

The Appellant further relied on protection of the procedure by renewing his motion to dismiss prior to, at the trial and at the close of trial. The Superior Court denied these motions. The Court supported its position by saying that nearly all divorce complaints followed this format and that the complaint was proper on its face, (Trial transcript). The Appellant had supported his motion for dismissal pursuant to Rule 80 (b), (Trial Transcript.).

The final order granted a divorce on the ground of a factual six months separation, which did not exist when the Appellant requested dismissal according to law. The final order of the Superior Court established that neither of the claims upon which the action was instituted supported the final order.

The Supreme Court of the State affirmed the final order of the Superior Court on the ground that practice, long recognized, due to the peculiar nature of a divorce action, allows a Vermont Court

to disregard the due process procedure enacted by the legislature.

The Vermont State Courts do not recognize that the substantive deprivation of property and freedom of the Appellant should have given him the right to the due process procedure, some time before trial, to establish whether the Appellee was likely to prevail. Notice as required by law, to prepare a defense and a meaningful opportunity to be heard at the trial, was denied to Appellant in the entire procedure.

III CONCLUSION.

The Vermont State Courts disregarded the Legislative due process procedure in a manner repugnant to the 14th Amendment to the U.S. Consitiution, to deprive the Appellant of liberty and property. In this manner the Vermont State Courts have established that, in divorce actions, parties do not have the right to protection of the procedural due process enacted by the State Legislature, even when substantial property rights and liberty are jeopardized.

The Appellant believes that for the reasons stated, probable jurisdiction should be noted.

Respectfully Submitted

Guido Condosta
Att. Pro-se
R. D. 1
Bernardston, Mass. 01337

APPENDICIES

APPENDIX A

NOTICE OF APPEAL

SUPREME COURT STATE OF VERMONT

ROSALIE CONDOSTA, APPELLEE

V CIVIL ACTION
DOCKET # 68 - 77

GUIDO CONDOSTA, APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES.

Notice is hereby given that Guido Condosta, the Appellant, appeals to the Supreme Court of the United States, from the entry order, Judgment Affirmed, of Sept. 11, 1978, and entry order, Motion to Re - Argue Denied, of Oct. 2, 1978, of the Vermont Supreme Court.

This appeal is taken pursuant to United States Code Title 28, Section 1257 (2)

Guido Condosta
Att. pro - se
R. D. 1
Bernardston, Mass. 01337

Dated, Oct. 5, 1978

APPENDIX B

SUPREME COURT
FORM NO. 1

ENTRY ORDER

SUPREME COURT DOCKET NO. 68-77
JUNE TERM, 1978

Rolalie Condosta — APPEALED FROM: Windham Superior Court

V.

Guido Condosta — DOCKET NO.

In the above entitled cause the Clerk will enter:

Judgement affirmed.

Dissenting:

FOR THE COURT:

Robert W. Larrow, Associate Justice
Concurring

Albert W. Barney, Chief Justice

Rudolph J. Daley, Associate Justice

Franklin S. Billings, Jr., Associate Justice

William C. Hill, Associate Justice

2M 5-73

1c
APPENDIX C

No. 68-77

Rosalie Condosta — Supreme Court

v. — On Appeal From Windham Superior Court

Guido Condosta

June Term, 1978

Present: Barney, C.J., Daley, Larrow, Billings, and Hill, JJ.

LARROW, J. The defendant below appeals from a divorce judgement awarded his wife. The action was brought originally on the ground of intolerable severity, and an allegation, denominated "anticipatory," of six months separation without reasonable probability of resumption of the maritial relationship. Defendant for the most part represented himself below, with the not unusual result that the docket entries alone, in the trial court are some eight pages in length. A review of the record demonstrates that he received full and considerate hearing on all the points he sought to raise. Following trial on the merits, the trial court filed extensive findings of fact, none of which are questioned seriously here. Although the findings contain ample basis for awarding the judgement on the ground of intolerable severity, the order granted the judgment on the ground of six months separation. No child custody was involved, the four children of the parties having attained majority. No alimony was awarded. The home premises of the parties, with furnishings, was awarded to the plaintiff, and defendant was permitted to retain some $16,000-$17,000 realized from the proceeds of a lawsuit against his public utility. Defendant was ordered to pay a total of $600 attorney fees.

2 The claims advanced by the defendant on appeal are not easily categorized. We will consider them in what seems to us logical order.

3 On November 1, 1976, defendant filed with the clerk of the Windham Superior Court a purported notice of appeal from orders relating, inter alia, to withdrawal of counsel, disqualification of judges, and a motion to amend a prior order. The accompanying fee was returned by the clerk, on instructions of the presiding judge, "because your right to appeal before the case has been completed has been denied." We agree with defendant that this action was inappropriate, and that determination of the validity of an appeal is a matter for determination by this Court, upon proper motion. But no prejudice is made to appear. All the rulings brought into question were interlocutory in nature, and no permission to appeal was ever asked or granted under V.R.A.P. 5(b)(1). Absent such a request, and with, of course, no motion in this Court after a trial court denial, the attempted appeal would have been dismissed anyway on motion here. Adams v. Wright, 133 Vt. 481, 346 A. 2d 217 (1975).

4 A second claim of error below, involved also in the attempted appeal discussed supra, is the refusal of members of the trial court to disqualify themselves upon defendant's motion claiming prejudice agaainst him. The record is virtually barren of factual support for this motion. It is based upon a claimed, and denied, allegation that the plaintiff, with her attorney, was in chambers with the court just before the temporary hearing, in the absence of the defendant who was waiting in the courtroom. Beyo.. l a general allegation that this must involve factual knowledge obtained outside the record, condemned in Siebert v. Siebert, 124 Vt. 187, 191-92, 200 A.2d 258, 261 (1974), there is no record showing of what this evidence was or what prejudice may have resulted from its acquisition. Bias or prejudice is not made to appear solely by allegation, and disqualification is not here required. State v. Beshaw, 134 Vt. 347, 351, 359 A.2d 654, 656-57 (1976). Moreover, as a result of the tortuous history of this case in the trial court, the presiding judge against whom the motion was directed did not participate in the hearing on the merits. Neither did one of the assistant judges, so that the motion eventually related only to one assistant judge. Nothing in the record is pointed out to us as indicating prejudice, and our search of the

record, not required under our rules, reveals nothing of a prejudicial nature. This claim of error is not sustained.

5 Defendant seems to place his greatest stress in his argument here upon the plaintiff's "anticipatory" allegation of six months separation in her original complaint, coupled with an allegation of intolerable severity. As nearly as we can analyze his argument, he contends (1) that the court should have granted his motion to dismiss for failure to state a cause of action; (2) that there was error in granting the judgement of divorce without amendment of the "anticipatory" allegation, thus depriving him of notice of the basis for relief asserted; and (3) that by granting his wife temporary use and occupancy of the home, the court in effect created the cause of action for which it granted divorce.

6 A cause of action was stated by the original complaint, without reference to the anticipatory allegation of separation; intolerable severity was alleged. Defendant argues that this additional allegation was also defective, because it did not set forth the specific acts claimed to constitute intolerable severity. V.R.C.P. 80(b) might seem to support this contention, requiring as it does that a divorce complaint "state particularly the factual basis of the claim." But long practice, under a statute with similar wording, has been the opposite, based upon the peculiar nature of the divorce action. Sanders v. Sanders, 25 Vt. 713 (1853); Hemenway v. Hemenway, 65 Vt. 623, 27 A 609 (1893); Raymond v. Raymond, 120 Vt. 87, 91, 132 A. 2d 427, 429-30 (1957). The underlying reasoning seems to be that the rights of the parties are protected adequately by obtaining particulars, if desired, by motion, and the absence of legislation mandating any other type of procedure. More particularity may now be obtained, if desired, under V.R.C.P. 12(e), a motion procedure to which defendant, despite his many other motions, did not resort. He did move to depose the plaintiff, and the motion was granted. No error appears in denying defendant's motion to dismiss. Further, while it might have been preferable procedure for the trial court to require an amendment of the Anticipatory allegation of continued separation, under V.R.C.P. 15(b), we can see no prejudice to defendant from a failure to do so. The record amply demonstrates that

there was no lack of notice to defendant that this was an issue; it was litigated and argued at great length. The issue having been fully tried, failure to amend does not affect the result. V.R.C.P. 15(b). We are not, moreover, in the light of long continued practice in our trial courts, inclined to overrule Hemenway v. Hemenway, supra, clearly applicable by analogy here. Under a former statute requiring a stated period of desertion, this Court held in Hemenway that anticipatory pleading of desertion was not subject to dismissal, even though unamended. Except for deletion of the word "anticipatory," the allegation would have remained unchanged. Long before final hearing, it had become evident that this word was mere surplusage, and its deletion would have verged upon the "useless act" that we do not require. See Raymond v. Raymond, supra, 120 Vt. at 92, 132 A.2d at 430.

7 Defendant's argument that the court created the cause of action upon which it granted the divorce is an ingenious one. It ignores, however, several factors. Apart from the fact that it would preclude awarding the use of home premises to a plaintiff separated from a spouse, unless and until the full six months separation has run its course, it also assumes that such living together as might defeat the grounds of separation can only occur upon the home premises. From the findings here it is clear that the plaintiff only concluded that she had "reached the end of her rope" after raising four children to majority through many years of marital discord. This is what brought about the divorce, not the ordering of the defendant from the home premises. And again, the argument overlooks the other pleaded ground, that of intolerable severity, simply stating with respect to it that it was "absent." Our review of the record, as we have indicated, confirms its presence, rather than its absence, even though the court, as is now customary, based its judgment on the ground generally considered to carry less connotation of opprobrium. Further, the order awarding temporary use of the premises is interlocutory in nature, appealable only under V.R.A.P. 5, to which defendant did not resort. As of now, superceded by the final judgment, its provisions are moot.

Defendant attacks the award of the home premises of the parties, valued at $25,000-$30,000, to the plaintiff. The premises are

not encumbered. His attack seems to be on two general grounds. The first is that the court considered the general question of alimony (although it awarded none) in making distribution of the property, when the original complaint contained no prayer for alimony. He cites Nichols v. Nichols, 133 Vt. 370, 340 A.2d 73 (1975). His second contention seems to run to the general question of overall fairness, implying, at least, that there was abuse of discretion. Both claims are without merit.

Whatever the present force of Nichols, it does not govern here. On almost identical facts to those here we have held Nichols to be inapplicable. In Bero v. Bero, 134 Vt. 533, 367 A.2d 165 (1976), we held the Nichols rule inapplicable where a division of property and "further relief" had been requested. Here also such a division was requested by the plaintiff, as was further relief. Here, as there, lump sum alimony was requested, and contested, during the trial. And here, defendant's own request contained one for equal division of the property. It would seem that only an undesired result prompts the protest here, rather than any legitimate criticism of the method by which it was reached. Moreover, alimony was not awarded, and the trial court refused to find defendant in contempt for ignoring the initial order for temporary alimony, under which he made no payments at all. The sole relief afforded the plaintiff was in the property division, and an award of attorney fees. If the temporary order, unappealed from, was invalid, that issue is now moot.

We have repeatedly upheld the wide range of drscretion given the trial court in regard to property disposition in a divorce action. 15 V.S.A. § 751; LaFarr v. LaFarr, 132 Vt. 191, 193, 315 A.2d 235, 236 (1974). The ultimate test is that the disposition be just and reasonable, and an important factor to be considered is the condition in which the divorce leaves the parties. Young v. Young, 135 Vt. 87, 89, 349 A.2d 225, 227 (1975). Inclusion in consideration of a tort settlement made pendente lite is proper. Bero, supra.

In the instant case, the homestead premises were financed in part by the proceeds of an insurance settlement, effectuated when the previous residence was destroyed by fire. The labor of the de

fendant was a large factor. The plaintiff worked on the construction, as did the children and neighbors. Defendant claimed some right of payment, and filed a mechanic's lien for his labor, which he did not perfect. The plaintiff, living in the home, is assisted in meeting her needs by payments made by two daughters who reside whith her. In total, plaintiff has annual income, largely Social Security, of about $1,700. Defendant, who has invested the proceeds of his litigation, has annual income from this and from Social Security aggregating some $3,500. In the more than three yers since this suit began, he has furnished plaintiff $170, and that unwillingly. In light of the foregoing, the length of the marriage, and its stormy course over many years, we are not disposed to disturb the judgment of the trial court. Even without any employment, defendant is left with more than twice the income of the plaintiff. No abuse appears, and the property dispo sition must stand. LaFarr v. LaFarr, supra.

Defendant's last claim of error, if we have correctly analyzed his arguments, relates to the allowance of $600 attorney fees against him. He seems to assign no specific grounds of error, beyond a claim that the attorney withheld facts from the court. This in turn seems to be premised upon his argument that the allegations of the original complaint were insufficient, which we have discussed and disposed of, supra. In Winslow v. Winslow, 127 Vt. 428, 434, 251 A.2d 419, 423 (1969), we emphasized the wide range of judicial discretion inherent in the awarding of attorney fees. Certainly no abuse of that discretion is here made to appear; the error, if any, is on the other side of the ledger when the record is viewed in its intirety.

Judgment affirmed.

FOR THE COURT:

Robert W. Larrow
Associate Justice

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APPENDIX D
STATUTORY PROVISIONS INVOLVED
1 - VERMONT STATUTES ANNOTATED
CHAPTER 11, TITLE 15 - SECTION 551
SUBSECTIONS 3 AND 7
PROVIDES IN PERTINANT PART AS FOLLOWS

Subchaper 2. Divorce

ARTICLE 1. GENERAL PROVISIONS

551. Grounds for divorce from bond of matrimony

A divorce from the bond of matrimony may be decreed:

(3) For intolerable severity in either party;

(7) When a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable. Amended

Amendment not applicable

VERMONT RULES OF CIVIL PROCEDURE.

RULE 12. DEFENSES
(PAGE 45)

(b) How Presented. Every defense, in law or fact, to a claim for refief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be m3de by motion:(6) failure to state a claim upon which relief can be granted, (7) A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS
(PAGE 54)

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

RULE 56. SUMMARY JUDGMENT
(PAGE 156)

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all ar any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be set for hearing no sooner than 10 days after the date of service. The adverse party prior to the day of hea.ing may serve opposing affidavits. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT
(PAGE 169)

(a) Automatic Stay, Exceptions-Injenctions and Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforecement until the expiration of 30 days after its entry or until the time for appeal from the judgment as extended by Appellate Rule 4(a) has expired. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action or, in an action for divorce, an order relating to the care, custody and support of minor children or to the separate support or personal liberty of the wife shall not be stayed during the pendency of an appeal. The provisions of subdivision (d) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

RULE 80. DIVORCE AND ANNULMENT
(PAGE 202)

(a) Applicability of Rules to Divorce. The Rules of Civil Procedure shall apply to actions for divorce, except as otherwise provided in this rule.

(b) Complaint; Service. The complaint in an action for divorce shall state particularly the factual basis of the claim and shall be signed and sworn to by the plaintiff, if of sound mind and of the age of 16 years.

(c) Orders prior to Judgment.

(3) Restraining or Mandatory Orders as to Property. Such judge may make such mandatory or other orders in respect to the possession, control, or use of the real and personal property of the wife, of the minor children, of the husband or of the husband and wife jointly, as may be just and equitable.

VERMONT STATUTES ANNOTATED
TITLE 1, PAGE 57
U.S. CONSTITUTION
ARTICLE XIV.

[§ 1. Citizens; privileges and immunities; due process; equal protection]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.